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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,

Petitioners,

v.

TOWN OF CLARKSTOWN,

Respondent.

On Writ of Certiorari to the Supreme Court,
Appellate Division, Second Department
of the State of New York

BRIEF OF THE
NATIONAL ASSOCIATION OF COUNTIES,
NATIONAL GOVERNORS' ASSOCIATION,
U.S. CONFERENCE OF MAYORS, COUNCIL OF
STATE GOVERNMENTS, NATIONAL CONFERENCE
OF STATE LEGISLATURES, NATIONAL LEAGUE
OF CITIES, NATIONAL INSTITUTE OF MUNICIPAL
LAW OFFICERS, AND THE INTERNATIONAL
CITY/COUNTY MANAGEMENT ASSOCIATION AS
AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether an ordinance that imposes identical requirements for processing in-town and out-of-state solid wastes is consistent with the Commerce Clause.

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AMICI CURIAE IN SUPPORT OF RESPONDENT**

INTEREST OF THE AMICI CURIAE

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. They have

a special responsibility to ensure that States and local governments have adequate authority to resolve the complex environmental problems of municipal solid waste disposal. In order to replace an environmentally unsatisfactory landfill with a modern waste transfer station, Clarkstown took the responsible but politically difficult step of increasing the costs of solid waste disposal for its residents. Reversal of the judgment below would hobble Clarkstown, hundreds of other local governments, and many States in their efforts to take responsibility for processing and disposing of their own solid wastes. *Amici* accordingly submit this brief to assist the Court in its resolution of this case.¹

STATEMENT

Amici adopt respondent's statement of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. In recent years, States, counties, and municipalities have undertaken the planning, construction, and operation of modern solid waste management facilities to replace old and often environmentally inadequate facilities such as landfills. The establishment of new local facilities (for example, transfer stations, recycling centers, compost plants, and waste-to-energy incinerators) is particularly remarkable because it indicates a significant change in the "first law of garbage"—that no one wants to take responsibility for the garbage they generate. State and local governments are now more willing to take responsibility for their own solid wastes and reduce reliance on their distant neighbors. State laws authorizing local regulation of solid waste flow are a critical component of this new approach. See Ann R. Mesnikoff, Note, *Disposing of*

¹ The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

the Dormant Commerce Clause Barrier: Keeping Waste at Home, 76 Minn. L. Rev. 1219, 1230-33, 1242-49 (1992).

Modern solid waste management facilities are expensive, and financing for these facilities is a necessary component of any comprehensive plan to remedy waste disposal problems. Local governments may ensure the necessary financing in any one of three ways, each of which results in their constituents bearing the principal financial burden: by levying taxes on their constituents, by imposing special assessments on property owners and waste generators, or by enacting any one of a wide variety of provisions often labeled "flow control laws." See C. Baird Brown & Charles S. Henck, *Structuring Municipal Solid Waste Financings*, in ALI-ABA, *Municipal Solid Waste: Disposal Strategies, Environmental Regulations, Contracts and Financing* 21-29 (1992). Flow controls are defined broadly as "legal provisions . . . to designate where MSW [municipal solid waste] from a specified geographic area must be processed, stored, or disposed." United States Environmental Protection Agency, *Public Meetings on Municipal Solid Waste Flow Control*, 58 Fed. Reg. 37,477, 37,478 (1993). Although solid waste management facilities may be financed directly through taxes and special assessments, some form of flow control is usually necessary where the facility is to be financed indirectly by residential and business payments to trash haulers who in turn pay tipping fees at the facility. See Brown & Henck at 23-25.

Flow controls play an important role in the efforts of many state and local governments to reduce solid waste disposal problems and to assume responsibility for waste disposal in their own backyards. More than half of the States have authorized counties and towns to exercise some form of control over the flow of municipal solid waste, and hundreds of local jurisdictions have solid waste

management plans that include flow control ordinances.² See 58 Fed. Reg. at 37,478. As the EPA has noted, “[f]low control has become a widely relied upon tool to cover the costs of existing facilities and may be a prerequisite to obtain financing for new facilities in many circumstances.” 58 Fed. Reg. at 37,478; see Note, 76 Minn. L. Rev. at 1225-26 & n.28, 1241 & n.107 (communities may be unable or unwilling to take responsibility for solid waste disposal without control over waste flow); Geoffrey A. Campbell, “Supreme Court’s Town Law Review May Pose Threat to Waste Bonds,” *The Bond Buyer*, May 25, 1993 at 1.

2. The Clarkstown ordinance at issue in this case is just one example of the great variety of state and local laws subsumed under the flow control rubric. See 58 Fed. Reg. at 37,478 (noting “wide variation in the specific circumstances of flow controls from one locality to the next”); Robert B. McKinstry, Jr. & C. Baird Brown, *A Checklist For Legally Enforceable Obligations To Use Disposal Services*, in ALI-ABA, *Municipal Solid Waste: Disposal Strategies, Environmental Regulations, Contracts and Financing* 379-83 (1992) (variety of means employed by local governments to ensure delivery of solid wastes to designated facilities). This ordinance and the provisions for construction and operation of a solid waste transfer station are the basic elements of the remedial plan adopted by Clarkstown under a consent decree with the New York Department of Environmental Conservation.

By establishing a transfer station to replace an environmentally deficient landfill and by imposing the costs of this facility on its own residents and businesses through the ordinance, Clarkstown has taken politically difficult

² At least one small State, Rhode Island, has sought to enact flow control legislation on a state-wide basis. See *Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp.*, 770 F.Supp. 775 (D.R.I.), *aff’d per curiam*, 947 F.2d 1004 (1st Cir. 1991).

steps to improve solid waste disposal. The critical considerations in this case, which petitioners completely overlook, are that the establishment of the transfer station substantially increased the costs of solid waste disposal in Clarkstown, and that the ordinance ensures that these costs fall primarily on Clarkstown residents and businesses. Clarkstown, directly contrary to petitioners’ claims, has not attempted to confer an economic benefit on local interests. Quite the contrary, the ordinance, coupled with the provisions for establishing the transfer station, has the effect of imposing substantially higher solid waste disposal costs on Clarkstown residents and businesses.

This adverse economic impact of flow control provisions on local constituents is the general rule. When a local government undertakes the construction and operation of expensive new waste processing or disposal facilities, flow control provisions are often included in solid waste management plans, and they have the effect of imposing the increased costs of financing the facility on that local government’s constituency.³ See Pet. Br. 32-33; Brief of National Solid Wastes Management Association as *Amicus Curiae* in Support of Petitioners 7, 10 (both citing increased costs of solid waste facilities imposed on local constituents by flow control provisions).

Clarkstown’s solid waste management provisions are designed to remedy significant environmental problems.

³ For example, voters in the City of Springfield, Missouri decided to establish a materials recovery facility as a means to take responsibility for disposing of their own trash and to reduce the need to export trash to other States and communities. Although construction of this new solid waste management facility will require an increase in tipping fees for trash haulers from \$17.50 per ton to approximately \$41.00 per ton and a corresponding increase of \$3 to \$4 per month in the average residential trash bill, the electorate also decided to impose these costs on themselves by approving a flow control provision. See *City of Springfield, Missouri, In My Backyard: Responsible Solid Waste Solutions* (not dated).

Under the ordinance at issue in this case, the costs of achieving this legitimate end are borne primarily by Clarkstown residents and businesses who must pay substantially higher fees for waste disposal at the designated transfer station than they would otherwise have to pay. The ordinance is not discriminatory because it applies evenhandedly to wastes generated in-town and wastes generated out-of-state and brought into the Town. Any burden imposed on interstate commerce is at most speculative. There is no reason why this Court should interfere with Clarkstown's efforts to take greater local responsibility for processing local solid wastes.

ARGUMENT

THE CLARKSTOWN ORDINANCE IS A VALID MEANS OF IMPROVING DISPOSAL OF MUNICIPAL SOLID WASTE BECAUSE IT DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE AND BECAUSE IT IMPOSES AT MOST ONLY AN INCIDENTAL BURDEN ON COMMERCE

A. The Validity Of The Clarkstown Ordinance Under The Dormant Commerce Clause Turns On A Careful Assessment Of The Burdens Imposed On In-Town And Out-Of-State Interests

This Court has long recognized that the dormant commerce clause imposes limits on state legislative power in the interest of promoting a national economic union. *H. P. Hood & Sons, Inc., v. Du Mond*, 336 U.S. 525, 537-39 (1949); *Willson v. Black-bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829). In determining these limits, the Court draws a fundamental distinction between state laws that evenhandedly burden in-state and out-of-state interests, and state laws that discriminate against interstate commerce. State laws are said to be "discriminatory" where there is little or no burden on in-state interests that corresponds to any burden imposed on out-of-state interests. See, e.g., *Chemical Waste Management*,

Inc. v. Hunt, 112 S.Ct. 2009, 2014 & n.5 (1992); *Wyoming v. Oklahoma*, 112 S.Ct. 789, 800 & n.12 (1992); *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

As a general rule, state laws that burden interstate commerce are valid if they serve legitimate state interests and if the burdens incidentally imposed on interstate commerce are not "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). State laws that discriminate against interstate commerce, however, are subject to a more demanding level of scrutiny and are invalid "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Wyoming v. Oklahoma*, 112 S.Ct. at 800. Moreover, "when the state statute amounts to simple economic protectionism," this Court has applied "a 'virtually *per se* rule of invalidity.'" *Id.* (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1973)).

Justice (later Chief Justice) Stone made the original distinction between state laws that burden or discriminate against interstate commerce. His justification of different levels of judicial scrutiny turned on an assessment of the operation of state political processes and in particular on a careful analysis of the relative burdens imposed on in-state and out-of-state interests. See *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 n.2 (1945); *South Carolina Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 184 n.2, 187 (1938). These fundamental inquiries continue to guide this Court's analysis of dormant commerce clause issues.

On the one hand, if a statute imposes similar burdens on both in-state interests and out-of-state interests, there is a political safeguard against legislative overreaching. As this Court has recognized, "[t]he existence of major in-state interests adversely affected by [a state statute] is a powerful safeguard against legislative abuse." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473

n.17 (1981). State legislators balance the burdens imposed on one set of their constituents against the benefits conferred on another set of constituents, and out-of-state interests are accorded the same protection from unduly burdensome regulations as in-state interests. *See Raymond Motor Transp. Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978).

On the other hand, to the extent that statutory burdens fall primarily on out-of-state interests, legislators are not subject to the same political restraints normally exerted when they impose similar burdens on their own constituents. *See Southern Pacific*, 325 U.S. at 767 n.2; *South Carolina Highway Dep't*, 303 U.S. at 184 n.2. Given this understanding of state political processes, the Court has recognized that it is appropriate to defer to state legislative policies that evenhandedly burden in-state and out-of-state interests and, conversely, that less deference should be given to legislative judgments imposing disproportionate burdens on out-of-state interests. *Compare Clover Leaf Creamery*, 449 U.S. at 472-73 (deference to state environmental regulations imposing burdens on both in-state and out-of-state interests) with *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675-76 (1981) (Powell, J., plurality opinion) and *Raymond Motor*, 434 U.S. at 444-46 & n.18 (both rejecting traditional presumption of validity of state highway safety laws that disproportionately burdened out-of-state interests).

The restraints imposed on state laws by the dormant commerce clause also apply to local laws. *See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 112 S. Ct. 2019 (1992). The party challenging an ordinance bears the burden of showing either that the local provision discriminates against interstate commerce by favoring local interests at the expense of out-of-state interests, or that the local provision imposes a burden on interstate commerce that is clearly

excessive in light of the local benefits. *See Hughes v. Oklahoma*, 441 U.S. 332, 336 (1979). As we demonstrate below, the state courts correctly found that petitioners completely failed to make any showing that the Clarkstown ordinance either discriminates against interstate commerce or imposes an impermissible burden on interstate commerce. Pet. App. 11a-12a, 19a-20a, 28a-31a.

B. Petitioners' Objections To The Clarkstown Ordinance Raise Only The Narrow Question Whether The Requirements For Processing In-Town Solid Waste May Also Be Applied To Processing Out-Of-State Solid Waste

The Clarkstown ordinance, as interpreted by the New York state courts, provides that (1) all acceptable solid waste generated within the Town, or generated outside and brought into the Town, must be processed at the Town transfer station or at a Town-approved recycling station, and that (2) the non-recyclable "residue" of any waste sorted at a recycling center must then be processed at the Town transfer station. Pet. App. 2a, 5a-6a, 24a-25a. The Appellate Division of the New York Supreme Court specifically determined that the provisions of § 3 applicable to in-town waste are identical to the provisions of § 5 applicable to waste generated outside Clarkstown. Pet. 5a-6a. Petitioners object to the ordinance only as applied to their activity as solid waste processors.⁴

⁴ Although the case does not raise any question about the effects of the ordinance on solid waste generators, trash collectors, or final disposal facilities, the ordinance applies just as evenhandedly to all of these activities as it does to waste processing. For example, the ordinance applies evenhandedly to all trash collectors, whether in-town, out-of-town, or out-of-state: no one may cart Clarkstown trash out-of-town, and all are free to bring non-Clarkstown trash to the Town transfer station. There is no evidence to suggest that the neutrally worded rules apply in a discriminatory fashion to favor in-town trash collectors or that the rules impose any burden on out-of-town trash collectors.

Similarly, all waste generators—regardless of their location—are free to use the Town transfer station, and the tipping fee paid

Petitioners maintain that they operate a recycling center, and they acknowledge that under the ordinance they may operate their facility to receive solid waste, sort out recyclable materials, and ship the recyclable materials out of town. Pet. Br. at 5 & n.3, 6. As solid waste processors, they challenge the ordinance on the narrow ground that they are required to take the "residue" (the non-recyclable component of the solid waste brought to their recycling center) to the Town transfer station for shipment to out-of-state disposal facilities instead of shipping the residue themselves to out-of-state disposal facilities. Pet. Br. 6.

Although petitioners never established the precise nature of their business, *see* Pet. App. 18a, a fair reading of the record indicates that petitioners challenge the ordinance only as applied to trash generated outside Clarkstown and brought to their facility from other parts of New York or from out of state, and that they do not challenge the ordinance as applied to solid waste generated in Clarkstown. Throughout the litigation below, petitioners repeatedly denied that they dealt in Clarkstown solid waste and claimed that the wastes processed at their recycling cen-

by trash haulers and passed on to waste generators is exactly the same regardless of the source of the waste. Although Clarkstown waste cannot be sent out of town, this aspect of the ordinance has no effect on out-of-town waste generators, and the burden on waste generators, if any, falls exclusively on Clarkstown residents and businesses.

Finally, with regard to landfills and other final disposal facilities, the requirement that solid wastes must be processed at the town transfer station neither discriminates against interstate commerce nor burdens that commerce. Prior to the completion of the transfer station, Clarkstown's solid wastes were deposited in-town at the town landfill. R. 251. Since the landfill was closed and the transfer station was opened, all wastes have been shipped out-of-state for final disposal. *See* Pet. App. 3a-4a, 30a. There can be no discrimination against out-of-state final disposal facilities simply because there is no in-town disposal facility that can be favored. There is also no burden on interstate commerce because all wastes are ultimately shipped in interstate commerce to out-of-state facilities. *See id.* at 30a.

ter came exclusively from outside Clarkstown. *See, e.g.,* R. at 81, 310, 332. In a parallel proceeding in federal district court initiated by petitioners, petitioners did not dispute that the Clarkstown ordinance was valid as applied to solid waste generated in the Town. Pet. App. 43a n.2. Moreover, as a factual matter "there is very little recyclable material in the acceptable solid waste generated" in Clarkstown, J.A. 10-11; thus, there would have been little reason for petitioners to bring Clarkstown solid waste to their facility (unless, contrary to their representations, *see* Pet. Br. 5 n.3, they were operating it simply as a transfer station to bale solid waste for out-of-state shipment).

In short, on this record, the case does not raise any question of Clarkstown's authority under § 3 of the ordinance to require that solid waste generated within the Town be processed at a particular facility. Instead, the case raises only the more limited question whether, under § 5, Clarkstown may impose the same rules for processing waste generated within the Town on waste generated outside Clarkstown and brought into the Town.

C. The Evenhanded Requirement That Both In-Town And Out-Of-State Solid Waste Be Processed At A Particular Transfer Station Serves The Town's Legitimate Interest In Improving Solid Waste Disposal And This Interest Outweighs The Entirely Speculative Burden Imposed On Interstate Commerce

Petitioners attack the Clarkstown ordinance principally by labeling it an "export ban" which, they assert, presents the "flip side" of the import restrictions disapproved in *Chemical Waste Management, supra*, and *Fort Gratiot, supra*. Catchwords and labels, however, are not a substitute for analysis of the actual burdens imposed on in-town and out-of-town interests by Clarkstown's provisions for processing solid waste. *See Henneford v. Silas Mason Co.*, 300 U.S. 577, 586 (1937). Thus, most courts have correctly recognized that careful comparison of the burdens imposed on local interests and out-

of-state interests is the key to determining the validity of waste flow regulations.⁵

Petitioners cannot carry their burden of demonstrating that Clarkstown has a purpose of protecting local economic interests for the simple reason that the ordinance substantially increases solid waste disposal costs for Clarkstown residents. Similarly, petitioners cannot demonstrate that the ordinance discriminates against interstate

⁵ For example, in a closely analogous case, the Third Circuit recognized that the "essential question" was whether a New Jersey flow control provision conferred an economic advantage on in-state economic interests; the court upheld the regulation because it in fact placed "the burden of alleviating the trash problem" on New Jersey residents. *J. Filiberto Sanitation, Inc. v. New Jersey Dep't Environmental Protection*, 857 F.2d 913, 919, 921-22 (3d Cir. 1988). Similarly, other courts have upheld the power of States and local governments to regulate the flow of municipal solid waste after considering the costs imposed on local interests. See, e.g., *Hybud Equipment Corp. v. City of Akron, Ohio*, 654 F.2d 1187, 1194 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982), *on remand*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985); *Harvey & Harvey, Inc. v. Delaware Solid Waste Authority*, 600 F. Supp. 1369, 1379, 1380 & n.15 (D. Del. 1985); *In re Long-Term Out-Of-State Waste Disposal Agreement between the County of Hunterdon and Glendon Energy Co. of Glendon, Pa.*, 568 A.2d 547, 554-55 (N.J. Super. Ct. App. Div.), *cert. denied*, 583 A.2d 337 (N.J. 1990).

In one case holding a flow control provision invalid under the dormant commerce clause, the court recognized the central importance of evaluating the allocation of burdens between local interests and out-of-state interests, but it found that the regulation conferred a benefit on local interests at the expense of out-of-state interests. See *Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp.*, 770 F. Supp. 775, 782-83 (D.R.I.), *aff'd per curiam*, 947 F.2d 1004 (1st Cir. 1991). In two other cases invalidating flow control provisions, either the court failed to give careful consideration to the burdens of financing waste management facilities imposed on local interests, see *Waste Systems Corp. v. County of Martin, Minn.*, 985 F.2d 1381, 1386-87 (8th Cir. 1993), or the record ignored this critical issue. See *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala. 1993).

commerce because it applies evenhandedly to all solid waste whether generated in Clarkstown or out-of-state and because it does not favor any in-town interest at the expense of analogous out-of-state interests. Finally, the contention that the Clarkstown ordinance imposes an impermissible burden on interstate commerce confuses adverse effects on petitioners' business with burdens imposed on interstate commerce.

1. *The Clarkstown Ordinance Does Not Have The Purpose Or Effect Of Economic Protectionism Because It Substantially Increases Waste Disposal Costs For Clarkstown Residents And Businesses*

Petitioners construe the Clarkstown requirement that solid waste be processed at a designated transfer station as an attempt to hoard trash and capture the fees for its disposal. Pet. Br. 10. More particularly, in light of the town's contract with the private operator of the designated transfer station, petitioners contend that the Town's purpose is to protect this contractor from competition and to reduce the chances that the Town will have to make direct payments to the contractor if an insufficient supply of solid waste is delivered to the transfer station. Pet. Br. 4-5, 11-12.

Petitioners' economic protectionism argument has a fatal flaw. Instead of garnering a local economic benefit, Clarkstown in fact has imposed a substantial financial burden on its residents and businesses. The Town's provisions for closing its landfill and establishing in its place a transfer station charging a tipping fee of \$81 per ton, coupled with the requirement that in-town solid waste must be processed at this facility, have the effect of substantially increasing the costs of solid waste disposal for Clarkstown residents and businesses.

Immediately prior to the opening of the transfer station in January 1991, solid wastes collected in Clarkstown had been deposited at the Town's landfill. See R. 126-28,

251. Although the record does not establish the tipping fees at the landfill in its last month of operation in December 1990, the low level of these fees is suggested by the fact that in 1987, just three years earlier, the Clarkstown landfill's tipping fee was as low as \$6 per ton. *See* R. 249, 258. The transfer station's \$81 per ton tipping fee was a substantial increase over the tipping fees previously charged by the landfill, and it seems inescapable that private haulers passed on the costs of these higher tipping fees in the form of rate increases to their residential and business customers in Clarkstown.

Indeed, looking simply at the \$70 per ton tipping fee charged at petitioners' facility, it is clear that the \$81 per ton tipping fee at the Town's designated transfer station raises solid waste disposal costs for Clarkstown waste generators. If the Town had simply closed the municipal landfill, Clarkstown residents, at least in theory, could have sent their solid waste to petitioners' facility at a cost per ton that would have been fifteen percent lower than the tipping fee at the designated transfer station. *See* Pet. Br. 32. Thus, petitioners' argument that Clarkstown is hoarding solid waste because it is a revenue-generating resource, *id.* at 15, ignores the critical fact that the revenue comes from Clarkstown residents and businesses who, but for the establishment of the transfer station and the requirements of the ordinance, would enjoy lower solid waste disposal costs. In the absence of any showing of economic protectionism, there is no merit to petitioners' contention, *id.* at 15-29, that the Clarkstown ordinance is *per se* invalid.

Far from attempting to protect local economic interests, Clarkstown took the politically difficult step of increasing its constituents' solid waste disposal costs as part of a comprehensive and responsible plan to resolve environmental problems at its municipal landfill. As the state appellate court found, Clarkstown entered into a consent decree with the New York Department of Environmental

Conservation, agreed to close the municipal landfill, and further agreed to implement a remedial plan "which would address the adverse environmental consequences caused by the landfill and by its closing." Pet. App. 3a. The state court determined that this remedial plan included both (1) the Town's provisions for a private party to construct and operate a transfer station charging a tipping fee of \$81 per ton, and (2) the provisions of the ordinance requiring delivery of solid waste to this transfer station.⁶ Pet. App. 4a-6a.

Both the transfer station and flow control are designed to promote Clarkstown's legitimate environmental interest in improving solid waste disposal. As the state court found, the Town's concern with the "continued economic viability" of its new solid waste management facility established under the remedial plan "does not negate or detract from, but in fact is a part of the health, safety, and environmental concerns such plan is designed to address." Pet. App. 10a (citations omitted).⁷ This finding is unimpeachable because the costs of the "continued economic viability" of the transfer station fall primarily on the residents and businesses of Clarkstown. Contrary to petitioners' arguments, Pet. Br. 11, 34, Clarkstown has not attempted to shift the cost of financing the transfer station from its residents and businesses to citizens of other jurisdictions. The costs of improving solid waste disposal are borne by out-of-town waste generators on exactly the same terms as in-town waste generators and only to the

⁶ The state court also found that an amendment to the Town's zoning code was part of the remedial plan. Pet. App. 4a-5a. Petitioners did not challenge this third component of the remedial plan. *See* Pet. Br. 5 n.3.

⁷ In analyzing the Town's remedial goals, petitioners artfully attempt to separate the flow control ordinance from the transfer station, and to attribute the Town's environmental purpose solely to the transfer station. *See* Pet. Br. 31. Given the state court's explicit finding, their argument has no merit.

extent that out-of-town waste generators choose to take advantage of the improved waste disposal facilities in Clarkstown. In these circumstances, there is no reason to retreat from the proposition that state and local governments have "every right to protect [their] residents' pocketbooks as well as their environment." *Philadelphia v. New Jersey*, 437 U.S. at 626.

2. *The Clarkstown Ordinance Is Not Discriminatory Because It Evenhandedly Imposes The Same Requirements On In-Town And Out-Of-State Solid Wastes*

In order to carry their burden of showing that the Clarkstown ordinance discriminates against interstate commerce, petitioners must show that the ordinance treats in-town and out-of-state solid wastes differently solely on the basis of the origin of the wastes or that it imposes some burden on out-of-state interests without imposing a corresponding burden on in-town interests. *See Hughes*, 441 U.S. at 336. Petitioners cannot show that the ordinance discriminates either on the basis of the geographic origin of the solid waste that they process or on the basis of the geographic location of waste processing activities.

The state court found, as a matter of state law, that solid waste generated outside of Clarkstown (in other areas of New York or out-of-state) and brought into the Town is regulated under § 5 in exactly the same fashion as solid waste generated in Clarkstown is regulated under § 3.⁸ Pet. App. 5a-6a. This finding forecloses

⁸ There is another way in which the non-discriminatory effect of the Clarkstown ordinance may be explained. As respondent carefully elaborates in its brief on the merits, petitioners harvest recyclable materials from solid wastes and generate non-recyclable residue. Under the Town's point of origin recycling program, residents of Clarkstown and other businesses in Clarkstown also harvest recyclable materials from the solid wastes that they generate. *See J.A.* 10-11. With respect to these locally generated residues, both petitioner and other Clarkstown interests must deliver

any argument that the ordinance discriminates against interstate commerce on the basis of the origin of the solid waste. Similarly, petitioners cannot show that the ordinance is discriminatory as applied to waste processing activities (like the operation of a recycling center or a transfer station). Petitioners make no showing that Clarkstown imposes different burdens on in-town and out-of-state recycling centers or transfer stations with respect to their dealings in either Clarkstown waste or waste generated outside the Town. *See* Pet. Br. 17-25.

Instead, petitioners simply assert that "[t]he effect of Local Law 9 is to prohibit flatly the export of trash to points outside of Clarkstown unless the trash is first brought to the designated facility for processing." Pet. Br. 18. Petitioners' characterization of the ordinance falls far short of a colorable showing of discrimination against interstate commerce because they do not even suggest that in-town and out-of-state activities or wastes are treated differently. The petitioners' assertion that "the ordinance bans the movement of the nonrecyclable trash from the recycling center directly to out-of-state destinations", Pet. Br. 6, is at most a claim that the ordinance incidentally burdens interstate commerce because both in-town and out-of-town solid wastes must be delivered to the transfer station prior to shipment to out-of-state final disposal facilities.⁹

them to the Town's transfer station. Thus, the ordinance is non-discriminatory, and the case does not raise any question of discriminatory treatment of wastes generated in-town and out-of-state.

⁹ Although a claim of discrimination against interstate commerce brought by an out-of-state waste processor would present a factually different case, any speculative argument about discrimination in these circumstances would have no merit because, even if a burden on out-of-state waste processors could be established, it would be matched by the burden imposed on Clarkstown residents and businesses who are forced to pay the higher in-town rates for waste disposal. *See Clover Leaf Creamery*, 449 U.S. at 472-73 (balancing

3. *The Incidental Burden Imposed On Interstate Commerce By The Clarkstown Ordinance Is At Most Speculative And Is Outweighed By The Town's Legitimate Interest In Improving Solid Waste Disposal*

As the lower courts found, petitioners have not demonstrated that the Clarkstown ordinance imposes any burden on interstate commerce. Pet. App. 11a-12a, 19a-20a, 28a-31a. In this Court, petitioners argue only that the ordinance "prevent[s] trash from being sent to the most cost-effective disposal facilities, and insulate[s] the designated facility from all price competition." Pet. Br. 32. This argument confuses an adverse effect on petitioners' business with an adverse effect on interstate commerce.

It may well be true that petitioners' facility is cheaper, because the tipping fee is \$11 per ton lower than the fee charged at the Town's designated transfer station. The requirement that petitioners take the non-recyclable "residue" of their operations to the Town transfer station for shipment to out-of-state disposal facilities instead of shipping the residue themselves to out-of-state disposal facilities may well increase their cost of doing business and have "the effect of putting petitioners out of business." Pet. Br. 6. Although the price differential may burden petitioners' business, it does not establish any burden on interstate commerce. See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978) (commerce clause protects the interstate market and not particular firms who participate in that market).

benefits conferred on in-state pulpwood producers and burdens imposed on in-state dairies and milk retailers against burdens imposed on out-of-state producers of plastic resins). The burden of higher solid waste disposal costs imposed on Clarkstown interests would negate any inference of economic protectionism. See *Wyoming v. Oklahoma*, 112 S. Ct. at 800 (dormant commerce clause prohibits regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors).

The glaring defect in petitioners' commerce clause argument is that the record is totally devoid of any evidence of the effect of the \$81 tipping fee on interstate commerce. Any contention that the \$81 tipping fee at the Town's designated transfer station burdens interstate commerce rests on the tacit assumption that the \$70 fee charged by petitioners is the market rate and that the \$11 fee differential will discourage the flow of solid waste into Clarkstown and then out of Clarkstown. Given a tipping fee of \$114.20 per ton at transfer stations in neighboring Bergen County, New Jersey, this assumption may well be wrong. See *Bergen County Utilities Authority, Tariff for Transfer Station Service Within the County of Bergen, New Jersey* (Doc. No. SE91020186) (Aug. 16, 1991); see also *Solid Waste Digest, Solid Waste Price Index* vi (Northeast/June 1993) (\$137.90 per ton tipping fee at BCUA Transfer Station). If \$114.20 per ton is the market rate, then the \$81 fee would have little if any impact on the flow of trash through Clarkstown because out-of-state solid waste generators and haulers would still prefer the tipping fees in Clarkstown even after an increase to \$81 per ton. In any event, on the record below, it is not possible to show any burden on the flow of goods in interstate commerce either into or out of Clarkstown.¹⁰ Petitioners have left the Court to guess-

¹⁰ Petitioners are perhaps reluctant to elaborate on the burdens allegedly imposed on the flow of solid waste in interstate commerce into Clarkstown because the trial court found that much of the out-of-state solid waste processed at their facility came from New Jersey in violation of that State's law. Pet. App. 19a, 31a. Similarly, petitioners have not offered any explanation how processing the residue of their recycling operations at the Town transfer station imposes any burden on the flow of solid waste out of Clarkstown. Such a showing is improbable given the unchallenged finding of the state courts that all non-recyclable solid waste is shipped in interstate commerce from Clarkstown to out-of-state disposal facilities. See Pet. App. 30a (solid waste is destined for out-of-state facilities whether shipped from Town transfer station or petitioners' facility).

work with respect to the burden, if any, imposed on interstate commerce.

Although the application of the *Pike* balancing test is occasionally difficult, *see CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 95-96 (1987) (Scalia, J., concurring in part and concurring in the judgment), there are no problems in applying this test where the scales are weighted only on one side. In cases where the scales are weighted only on the side of the burden imposed on interstate commerce and there is no countervailing proof of a State's legitimate health or safety purpose, the Court readily holds state laws invalid under the dormant commerce clause. *See Kassel*, 450 U.S. at 675, 678-79 (Powell, J., plurality opinion); *Raymond Motor*, 434 U.S. at 447. In this case, where the balance is weighted only on the side of the Town's legitimate environmental interest in improving solid waste disposal and there is no countervailing showing of any burden on interstate commerce, the Court should just as readily sustain the Town's ordinance.

4. *This Court Should Not Sit As A Superlegislature To Review Alternative Means Of Providing For The Construction And Operation Of Solid Waste Management Facilities*

In the absence of any showing that the Clarkstown ordinance either discriminates against or burdens interstate commerce, there is no occasion to address the question whether there are alternative means that the Town should have employed to achieve its legitimate end of improving solid waste disposal. *See Maine v. Taylor*, 477 U.S. at 138 (if a statute is shown to be discriminatory, State has burden of showing that its purpose could not be served as well by other non-discriminatory means); *Pike*, 397 U.S. at 142 (if statute is shown to burden interstate commerce, courts will consider whether state interest could be promoted as well by other less burdensome means). Nonetheless, petitioners urge this Court to

explore alternative means of providing for the construction and operation of modern solid waste disposal facilities and to substitute one of these alternatives for the approach taken by Clarkstown in its remedial plan. Pet. Br. 27-29, 36-37. The Court should decline petitioners' invitation to sit, in Justice Black's apt phrase, as a "super-legislature." *See Southern Pacific*, 325 U.S. at 788 (Black, J., dissenting).

Petitioners' discussion of alternatives to the Clarkstown remedial plan begins with the assertion that it is not "impossible to finance [a waste disposal project] without a flow control law." Pet. Br. 28 (citing Mark Ryan, *Courts Complicate Solid Waste Financings*, *Standard & Poor's Creditweek Municipal* at 69, 70 (Nov. 9, 1992)). This assertion is true only in the general sense—made clear by a full reading of the article cited by petitioners—that a public subsidy is not always necessary to ensure the successful construction and operation of modern solid waste facilities. *See Ryan, Courts Complicate Solid Waste Financings*. This same article, however, also indicates that some form of guaranteed public support like special assessments on property owners or control over waste flow is often necessary to maintain the financial integrity of solid waste management facilities. *See id.* at 70.

In this case, Clarkstown determined that control over waste flow was necessary to provide for the construction and operation of a transfer station. Petitioners, however, urge the Court to require Clarkstown to use special assessments or local taxes instead. Pet. Br. 29. But taxes or special assessments on property owners and control over waste flow are merely different forms of public subsidies,¹¹

¹¹ Taxes or special assessments on property owners are direct means of requiring local financial support for waste management facilities. Control over flow of wastes from property owners is an indirect means of ensuring local financial support for a waste disposal facility. Residents and businesses in Clarkstown, for example, must send their solid wastes to a designated solid waste facility and pay higher fees than they would otherwise have to pay.

and the question in this case is whether the Court should second-guess Clarkstown's decision about the form of public subsidy that is appropriate to provide for the construction and operation of the transfer station.

Amici submit that where, as here, the burdens of guaranteeing public support for the transfer station fall primarily on Clarkstown interests, there is no need for the Court to consider alternative forms of public support and to second-guess the Town's political determination about the best means of improving solid waste disposal. This burden on local interests ensures that local decision-makers have carefully evaluated the costs and benefits of their remedial plan. Moreover, the two alternative forms of public subsidy advanced by the petitioners—taxes and special assessments—are simply alternative means of ensuring that local interests bear the costs of financing waste disposal facilities; petitioners do not even begin to suggest how or why these alternative forms of public subsidy would have a less burdensome impact on interstate commerce than the approach taken by Clarkstown.¹²

Clarkstown responsibly imposed the costs of the transfer station on its citizens by requiring them to use the designated facility even though they might have obtained disposal services elsewhere at lower price. Clarkstown could also have imposed the costs of building and operating the transfer station on its citizens by levying a tax or imposing a special fee on property owners. Petitioners' suggestion that Clarkstown chose to control waste flow because tax levies or utility fees are less politically popu-

¹² Clarkstown also might combine lower tipping fees with increased taxes or special assessments, but these strategies might well result in forcing Clarkstown citizens to subsidize the management of out-of-town wastes. The commerce clause certainly does not require a local government, having taken responsible steps to manage its own wastes, to confer benefits on outside interests in the form of subsidized waste services by disproportionately burdening its own constituents.

lar has no basis in fact. *See* Pet. Br. 36. As the complaints of three Long Island, New York villages illustrate, perhaps unwittingly, the increased costs of financing waste disposal facilities under flow control laws are just as politically sensitive as increased taxes or fees. *See* Brief of Incorporated Village of Westbury *et al.* as *Amici Curiae* in Support of Petitioners. There is, then, simply no warrant for the courts to control state or local government choices among a variety of politically difficult means of financing solid waste disposal.

D. The Clarkstown Ordinance Is Consistent With Both The National Policy That States and Local Governments Should Assume Responsibility For Their Own Solid Wastes and the Basic Principle That "Our Economic Unit Is The Nation"

The Clarkstown ordinance, coupled with the provisions for establishing the new transfer station, promotes the Town's legitimate interest in improving solid waste disposal. The ordinance is consistent with the national policy established by the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*, that States and local governments should shoulder responsibility for environmentally sound disposal of solid wastes generated in their jurisdictions. *See* Note, 76 Minn. L. Rev. at 1223-30, 1242-49. It is also consistent with the "basic principle that 'our economic unit is the Nation.'" *Hughes*, 441 U.S. at 339 (quoting *H. P. Hood & Sons*, 336 U.S. at 537 (1949)). In taking greater responsibility for the processing and disposal of local solid wastes, Clarkstown neither discriminates against interstate commerce nor imposes any cognizable burden on interstate commerce. Instead, the burdens of financing the Town's new solid waste management facility fall primarily on Clarkstown residents and businesses.

The imposition of significant financial burdens on local interests distinguishes the Clarkstown ordinance from the prohibitions on exports, local processing requirements, and

import restrictions that this Court has condemned in other cases. In these cases, the state or local laws at issue either did not impose any burden on local interests and imposed burdens exclusively on out-of-state interests or these laws provided benefits solely for local interests. Thus, for example, the export restriction held invalid in *Hughes* imposed burdens exclusively on out-of-state interests and reserved benefits exclusively for in-state interests. All of the burdens of Oklahoma's prohibition on exporting natural minnows fell on individuals who wished to use them as bait for fishing outside of the State, and the benefits of fishing with these minnows were reserved solely for fishing in Oklahoma.¹³ See *Hughes*, 441 U.S. at 336-38.

Similarly, in the cases that petitioners collect under the label "local processing" requirements (Pet. Br. 22-23), the laws at issue conferred benefits on local interests and did not impose any burdens on these interests. For example, in *Pike*, an Arizona statute provided that all cantaloupes grown in Arizona had to be packaged in Arizona prior to interstate shipment. 397 U.S. 137. This statute, which the Court held invalid under the dormant commerce clause, was designed to enhance the reputation of Arizona cantaloupe growers, and did not impose any burdens on Arizona interests.

Just as the imposition of significant financial burdens on local interests distinguishes the Clarkstown ordinance from laws condemned as either prohibitions on exports or local processing requirements, the allocation of benefits and burdens between local and out-of-state interests also distinguishes the import restrictions held invalid by this Court in three recent cases. In *Philadelphia v. New Jersey*, 437 U.S. 617, this Court held that a facially dis-

¹³ In addition to *Hughes*, petitioners cite several other cases holding export restrictions invalid. Pet. Br. 19-22. These cases are also easily distinguished because the provisions at issue reserved benefits for in-state interests and, in sharp contrast to the Clarkstown ordinance, did not impose any burdens on local interests.

criminatory New Jersey law prohibiting the importation of most forms of solid waste violated the commerce clause. All of the burdens of the state law fell on out-of-state interests that were completely barred from access to New Jersey landfills and no burdens were imposed on New Jersey citizens. See *id.* at 628-29. All of the benefits of conserving scarce landfill space, minimizing pollution problems, and reducing waste disposal costs were reserved for New Jersey citizens. See *id.* Similarly, *Chemical Waste Management* and *Fort Gratiot* invalidated state laws that reserved the benefits of waste disposal sites for in-state interests and did not impose any burdens on in-state interests.

In these cases and others condemning export prohibitions, local processing requirements, and import restrictions, one State attempted to promote its parochial interests at the expense of its sister states and effectively opted out of the interstate market. The Clarkstown ordinance is fundamentally different. Instead of imposing burdens on out-of-state interests, this local law imposes its burdens on local interests. As the Chief Justice has noted, "Commerce Clause concerns are at their nadir" when state or local laws impose burdens on local interests. *Fort Gratiot*, 112 S. Ct. at 2029 (Rehnquist, C.J., dissenting).

There is a substantial risk of disruption of interstate commerce, balkanization, and retaliation when state or local laws protect local economic interests by imposing burdens on out-of-state interests. See, e.g., *Philadelphia v. New Jersey*, 437 U.S. at 629. Provisions like the Clarkstown ordinance that impose burdens on local interests, however, do not create the same risk of disrupting interstate commerce. The danger is not that other communities or States will retaliate because Clarkstown has taken greater responsibility for disposing of its solid wastes; the danger is that other communities, unlike Clarkstown, may not be willing to take the politically difficult step of imposing costs on their constituents in order to improve solid waste disposal.

CONCLUSION

The judgment of the Supreme Court, Appellate Division, Second Department of the State of New York should be affirmed.

Respectfully submitted,

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